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**FREEDOM OF SPEECH.** By Zechariah Chafee, Jr. New York: Harcourt, Brace & Howe. 1920. pp. 431.

Professor Chafee presents a well-written and thoughtful discussion of a difficult and important subject. Those who will disagree with some of his conclusions will admit the thoroughness and fairness of his reasoning and the aptness and force of his historical illustrations. As an argument designed to secure adherents to views at present unpopular it might with advantage have been briefer. "Most souls are saved during the first thirty minutes of the sermon." But its painstaking fullness constitutes a formidable challenge to those who would disagree with the author upon rational and permanent grounds.

The book is divided into seven chapters, comprising an account of the historical background of our guaranties of free speech, with discussions of their application to opposition to the war with Germany, to legislation against sedition and anarchy, to the deportation of radical aliens, to unauthorized searches and seizures, to the right of a legislature to exclude duly elected members for political utterances, and to the control of teachers. A separate chapter is devoted to *United States v. Abrams*. The appendices contain useful bibliographies, indices, and statutory texts. To the general bibliography might be added the searching and candid article by Walter Lippman, "What Modern Liberty Means," 124 Atlantic, 616 (November, 1919).

Professor Chafee's position regarding the application of the guaranties of free speech to opposition to the war with Germany apparently is that it was unconstitutional or at least extremely unwise to forbid utterances that fell short of direct incitement to resist the draft or to refrain from volunteering, and that even such utterances were not properly punishable unless there was a clear and present danger of their success. And, furthermore, granting, though dubiously, the constitutionality of forbidding utterances falling short of such direct incitement, even when intended to produce results that Congress could forbid, a "clear and present danger" of such results must exist — meaning by this, apparently, more than that they should have a "natural and reasonable effect" in producing the results, as judged under the circumstances existing or supposed to exist at the time of the utterances.

The principal reasons for these views are: (1) the difficulty of proving the requisite bad intent with certainty, and the consequent likelihood that unpopular persons will be erroneously found by excited juries to have bad intents on evidence sufficient to sustain the verdict; and (2) the desirability of having opinions and statements that might conceivably help the public to form its judgments laid before it, regardless of the motives or intentions of the utterers. However strong, *prima facie*, are these reasons, there is also to be considered the grave danger that in time of war ill-disposed persons, by utterances cleverly designed to keep just within any objective tests, will actually interfere, intentionally, with the success of governmental operations. The entire setting of modern war, physical and psychological, with its complex military, economic, social, and political factors, renders this easy and likely of accomplishment, unless dealt with by methods so searching and drastic as to be readily susceptible of mistakes and even abuse. In ordinary times the social interest in free discussion so plainly outweighs all possible gains from its suppression that only somewhat direct incitements to illegal or injurious conduct may be forbidden, but in the emergency of a great war the advantages and disadvantages of suppression are at least evenly enough balanced to make a decision either way within the legitimate bounds of legislative discretion.

Free speech is not the only or the predominant interest enshrined in our constitutions. Life, liberty, and property in ordinary times are also expressly and adequately protected. And just as "due process of law" in time of war means something different as regards governmental control over life, liberty,

and property from its meaning in time of peace, so permissible "freedom" of speech in war time is different from that in peace time. The reasonable necessities of the situation qualify the war-time application of all our constitutional guaranties save a few that are obviously intended to be perfectly precise and absolute, and the right to free speech is no exception. Candidly recognizing the force of this reasoning in general, Professor Chafee suggests that the *social* interest in free speech as contrasted with the *individual* interests in other constitutional guaranties entitle the former to more consideration. But surely liberty and property are protected, not merely for the sake of the individual, but also for the social interest in the individual's freedom to use his faculties and acquisitions as he will; and, if there be a difference in the extent of the protection to be given social and individual interests, one might well think, when Congress and public opinion overwhelmingly acquiesce in the temporary subordination of the social interest in somewhat dangerous free speech to the social interest of speedily winning the war, that this determination by those who are most representative of the social interests involved is more entitled to respect than a like determination against the strictly individual interests of a minority of large property holders, who are overridden by a majority *not* representative of the individual interests affected. The only practical view seems to be that, in the emergency of war, all social and individual interests may be restricted so far as is reasonably necessary to accomplish the ends of the war, and that here, as in other cases, the legislature gets the benefit of the doubt in deciding what is reasonable.

To the suggestion that advantage might be taken of a war with Haiti or Liberia to impose the same restrictions on free speech as in the war with Germany, the obvious answer is that it is not alone a technical state of war but a reasonably conceived necessity for the restrictions that justify them. During an important war, and for a reasonable period thereafter, while the passions engendered are still hot and the disturbances of the economic and social order unhealed, the state may lawfully limit the ordinary freedom of speech and of transactions, if this can be thought reasonably necessary for the public welfare; but the mere existence of distant or trifling military operations that have no sensible effect upon our economic or social fabric would not justify such interferences.

Nor is too much to be made of Mr. Justice Brandeis's dissenting *dictum* in *Schaefer v. United States*, 251 U. S. 468, that the probable effect of words is properly to be weighed only by "men judging in calmness." The meaning that may reasonably be placed upon language and the effects that may reasonably be feared to result from it depend largely upon the circumstances under which it is uttered, including the states of mind of its hearers and the public. One who is repelling assault and battery is not required at his peril to judge of the proper limits of self-defense with the detachment of a bystander. In appraising the correctness of his decision the court will take into account his naturally excited state of mind. He need only decide as well as could fairly be expected from the average man under such circumstances of provocation and excitement. At least as much latitude must be allowed in estimating the probable effect of words in war time. It is doubtless true that, during the late war, men of average intelligence and credulity believed there was much greater danger from pro-German and treasonable activities than was in sober truth the case, but this did not stamp such beliefs as unreasonable, considering the emergency and the imperfect information available. If public opinion of average intelligence generally shared the belief that certain types of utterances were reasonably likely substantially to interfere with the effective conduct of the war, it was well within a proper legislative discretion to forbid such utterances, and to take the verdict of a jury upon this inference of fact and upon the intention of the defendant in making the utterance. The practical

certainty that some mistakes and abuses would occur in the administration of such a law was to be weighed by Congress against the practical certainty that without it a good deal of ill-intentioned and actually mischievous propaganda could not be checked by lawful means, and was pretty certain to be dealt with by unlawful violence. To the reviewer it seems impossible fairly to say that the judgment Congress passed upon this question was in its essential features unreasonable, in view of the existing information and temper of the country; and, if not, its action was constitutional, unless free speech is subject in time of war to qualifications of a markedly different character from those of other important constitutional rights. For the latter view there seem to be no historical, logical, or practical arguments so conclusive as to remove the matter from the proper sphere of legislative discretion.

Perhaps an undue amount of space has been given to a criticism of the author's views upon a single topic, but Professor Chafee's argument is so candid and forceful that it seems worth while to sketch with some fullness the opposing view. And, in regard to some other topics of the book, where a seriously reasoned dissent from his position is possible, it rests upon substantially similar grounds, *i. e.*, a belief that he attributes too great a relative value to a somewhat dangerous degree of freedom of speech as compared with other war-imperiled social interests, and that he underestimates the war-time power for ill of the engines of modern publicity in cunning and unscrupulous hands. The correctness of such a belief is manifestly not susceptible of demonstration, and it is impossible to deny that its foundations may be largely temperamental, but so long as it is widely shared the validity of legislation based upon it seems fairly clear. See *Jacobson v. Massachusetts*, 197 U. S. 11, 34-35; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 364-366.

It is of course not difficult to find some regrettable errors and excesses in both the judicial and the executive administration of the Espionage Acts. Professor Chafee very properly points these out. His criticism of much that was done by the Department of Justice under the Deportation Act, and by the Postoffice Department under its power to exclude from the mails, will be generally approved by thoughtful men and women. And of course the expulsion of the Socialist members from the New York Assembly is too vulnerable to find defenders among the judicious.

To the reviewer the greatest value of Professor Chafee's book lies not in his specific conclusions upon controverted topics, but in the admirable manner in which he presents the arguments of policy for freer speech than a legislature need constitutionally grant in troubled times. Whether such arguments should prevail or not is always debatable, but it is a matter of the first importance that the legislature should have all that can be said against repression well presented before it comes to a decision. From this standpoint the author's views, both as to the substantive and the administrative features of laws limiting free speech, are worthy of the most careful consideration. And, finally, it is a pleasure to bear witness to the fine spirit and temper of the book, its fairness, its scholarship, its flashes of humor, and (most grateful to the reader) its forceful good English.

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INTERNATIONAL LAW AND THE WORLD WAR. By James Wilford Garner. In two volumes. 8vo. London and New York: Longmans, Green and Company. 1920. pp. xviii, 524; xii, 534.

This is a serviceable book. It is true that at least three impossibilities threaten the author's path toward perfection. On one side is the impossibility